

- (1) Whether the claimant suffered accidental injury arising out of and in the course of his employment on the date or dates alleged.
- (2) Whether notice was given pursuant to K.S.A. 44-520 on both accidents.
- (3) If notice was not given, does just cause exist for claimant's failure to satisfy the notice requirements of K.S.A. 44-520 for both accidents?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the preliminary hearing record, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury on two separate occasions, the first an accident occurring during the period March 1st through March 14, 1997. The second, a series, ran from April 1st through April 4, 1997, with April 4, 1997, being claimant's last day of work. Claimant contends he injured himself the first time while carrying a carpet with several other men. The carpet roll was very heavy and required at least five people to handle. Claimant contends the second injury occurred in April while carrying tiles for respondent. This April aggravation was significantly less serious than the carpet carrying incident alleged in March.

Respondent denies claimant met with accidental injury on either date, contending claimant's version of the story did not occur. The testimony is conflicting in this matter. There is evidence from claimant and from Brian Pool, an ex-employee of respondent, alleging that claimant suffered the injury while carrying the carpet and that claimant advised Mr. Robert Geraci, an employee of respondent, of the injury. Respondent provided several witnesses who contest the version provided by claimant and Mr. Pool and who allege that the carpet carrying incident, while it did occur, resulted in no injury to claimant's shoulder.

In reviewing this conflicting record the Appeals Board finds, for preliminary hearing purposes, that claimant has carried his burden of proof regarding accidental injury arising out of and in the course of his employment during the period March 1st through the 14th, 1997. However, for the period April 1st through April 4th, 1997, claimant's testimony is less clear. Also, as Mr. Pool was not employed for respondent at that time, he could not verify any of the incidents described by claimant. The Appeals Board finds the evidence insufficient to justify compensation for the alleged April accident. However, the Appeals Board does find claimant has proven accidental injury arising out of and in the course of his employment to the right shoulder during the first period in question.

Claimant alleges notice was provided to Mr. Robert Geraci on the date of accident in March and on several occasions within a few days of the accident date. Respondent does not specifically deny that notice was provided to Mr. Geraci and Mr. Geraci's testimony was never presented. Likewise, a recorded statement given by Mr. Geraci to an insurance adjustor was never placed into evidence. Respondent's contention is that Mr. Geraci, while an employee of respondent, was not in a supervisory capacity over claimant. Both claimant and Mr. Pool contend Mr. Geraci was the supervisor on that particular job as Mr. Sellens, the normal supervisor, had been removed from the job site due to an alleged conflict with a painter. Unfortunately, the Appeals Board is limited regarding Mr. Geraci's knowledge of these events and his position with respondent.

Several questions regarding his employment relationship and the alleged injury to claimant could have been clarified had Mr. Geraci testified. However, a conflict appeared to have developed between Mr. Geraci and the claimant regarding whether claimant's allegation of injury in some fashion implicated Mr. Geraci.

The Appeals Board finds, based upon the testimony of claimant and Mr. Pool, that Mr. Geraci was acting in a supervisory capacity in March 1997 when claimant injured his right shoulder. The testimony of claimant and Mr. Pool is sufficient to convince the Appeals Board that claimant advised Mr. Geraci of the shoulder injury within ten days of the March accident and thus the notice requirements of K.S.A. 44-520 have been met. In so finding, the Appeals Board renders the issue of just cause moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of the Administrative Law Judge Nelsonna Potts Barnes dated November 4, 1997, granting claimant benefits for the March 1997 accident, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

c: Norman I. Cooley, Wichita, KS
M. Doug Bell, Coffeyville, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director